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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND
RULES 34(b)(1)(D) AND (f)(1)(B)
ARIZONA SUPREME COURT**

Supreme Court No. R-16-0042

**Comment in Support of Petition to
Amend Ariz. R. Sup. Ct., Rules
34(b)(1)(D) and (f)(1)(B)**

Per Rule 28(D), Rules of the Supreme Court, the undersigned respectfully submits this Comment in support of the above-mentioned petition for two simple reasons. First, the rule amendment would promote greater access both to the bar and for consumers. Second, I support the petition because it would advance economic liberty.

Beyond my sincere desire to advance those twin goals, I have no other interest, connection or tie to the Petitioner.

Technology promotes access.

For more than a decade, the value and validity of online learning has been amply demonstrated through the success of Massive Open Online Courses known as MOOCs. These courses have successfully provided free, open, online access to

learning from the best universities around the world.¹ And with respect to credentialed online degrees, according to *U.S. News and World Report*, "there are more than 1,200 U.S.-based distance degree programs." Indeed, the publication goes so far as to rank them by quality.²

For some time, then, students have secured for themselves the ability to earn fully accredited undergraduate and graduate degrees through online learning. Beyond this, there is little need to expansively recite how technology has transformed our lives, culture, society and economics. Suffice it to say the availability and acceptability of online credentialed programs have opened avenues to economic expansion and professional advancement for many Americans. So why not law schools?

One obvious explanation is the legal profession's historical hidebound aversion to change and especially, to technological innovation. Surely, for example, the stories are apocryphal but are there lawyers still depending on office staff to read, print and pass along their emails?³

¹ See MOOC List at <https://www.mooc-list.com/>

² *U.S. News & World Report Unveils 2016 Best Online Programs*, U.S. News & World Report, January 12, 2016, <https://www.usnews.com/info/blogs/press-room/2016/01/12/us-news-unveils-2016-best-online-programs>

³ Mark Chinn, *Why Don't People - Lawyers in Particular - Use Technology? Is it Because of the Billable Hour?* Chinn & Associates, August 16, 2010, <https://chinnlaw.com/resources/why-dont-people-lawyers-in-particular-use-technology-is-it-because-of-the-billable-hour/>

In point of fact, so pronounced has been legal profession avoidance of technology that lawyer ethical rules had to be amended to force the Luddites⁴ among us to become if not *early adopters* at least not totally clueless ones.⁵ Ergo, came the explicatory Comment since adopted by upwards of 27 states,⁶ including Arizona, that:

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."⁷

Florida even upped the ante with the Florida Supreme Court's promulgation of a new rule requiring Florida lawyers to take at least three hours of CLE in an approved technology program as part of the 33 total hours of CLE required over a three-year period.⁸

This brings us to the subject petition asking permission for online law school graduates approved by one of the six federally recognized regional accreditors to sit for the Arizona Bar Exam. Given the aforementioned viability and acceptance

⁴ "Lawyers can't be Luddites," writes Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits*, *New Model Ethics Comment Says*, ABA Journal Law News (August 6, 2012) http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits/

⁵ Karin S. Jenson, Coleman W. Watson, and James A. Sherer, *Ethics, Technology and Attorney Competence*, BakerHostetler <http://www.law.georgetown.edu/cle/materials/ediscovery/2014/frimordocs/ethicsinediscoverybakerhostetler.pdf>

⁶ Robert Ambrogi, *Another State Adopts the Duty of Technology Competence for Lawyers*, Law Sites, updated March 8, 2017, <http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html>

⁷ ABA Model Rules of Professional Conduct ER 1.1, Comment 8 (2012) http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html

⁸ Victor Li, *Florida requires lawyers to include tech in CLE Courses*, ABA Journal, February 1, 2017 http://www.abajournal.com/magazine/article/technology_training_cle

of other professional degree programs, it seems this should scarcely be novel or innovative -- save when it involves the legal profession. Frankly, it's overdue.

Just the same, I would be remiss not to mention one unfortunate consideration. Thanks to some 200 ABA-accredited law schools having already churned out what some observers will argue is a surfeit of lawyers, some colleagues may shake their heads in exasperated dismay at the prospects of even more competition. Katy has not just barred the door. She is hiding in the basement.

But protectionism ought never to have been the goal of occupational regulatory barriers -- at least that's not an admission 'active market participants' make for public consumption. In truth these barriers have been more for the sake of the regulated -- seldom for the good of consumers. They have amounted to anticompetitive practices that drive up consumer costs by limiting access to the legal services marketplace.

Our legal profession must embrace the transformative technologies impacting virtually every occupation and profession. So regardless of competition, the Petitioner is right. If an online law school enhances access to geographic areas outside the reasonable reach of Arizona's three existing law schools and does so at a lower cost,⁹ then there's much to commend the proposition.

⁹ According to tuition and fee information posted on Kaplan's Concord Law School website, the current total cost of an online JD is about 37% of the total cost of an ABA law school JD. See <https://www.concordlawschool.edu/admissions/tuition>

Access to Justice.

Depending on one's idiomatic inclination, the elephant in the room or the skunk in the parlor is that so long as today's law school graduates are encumbered by soul-crushing school loan debts,¹⁰ the access to justice will be frustrated. When a new lawyer herself qualifies for pro bono services, it's hardly realistic to expect them to expand access to justice by working for free or for wages that not only frustrate upward mobility but render long term debt service nearly impossible.¹¹

Until the legal establishment addresses this forthrightly and pragmatically, clarion calls whether aspirational or proscribed¹² asking lawyers to deliver on access to justice will remain just hollow pontifications. Therefore, to the extent an online law school drives down the astronomical cost to join the profession and thereby helps expand the availability of affordable legal services to poor and middle income Arizonans, I reiterate there's much to commend the proposition.

Economic liberty.

Finally, this petition makes a lot of sense from the standpoint of promoting consumer choice and thwarting continued economic protectionism. There is no question that assuring quality and protecting the public from incompetence are as

¹⁰ Average law school debt is well into the six figures. See *Law School Financing*, Law School Transparency, <http://www.lawschooltransparency.com/reform/projects/Law-School-Financing/>

¹¹ The employment market remains "challenging" for new lawyers. See Stephanie Francis Ward, *4% decline in jobs requiring bar passage for law class of 2016, ABA employment data shows*, ABA Journal, May 11, 2017, http://www.abajournal.com/news/article/employment_data_shows_challenging_job_market_for_2016_law_grads

¹² Ronald D. Rotunda, *Forcing Lawyers to Perform Pro Bono Services*, Verdict, Legal Analysis and Commentary from Justia, July 18, 2016, <https://verdict.justia.com/2016/07/18/forcing-lawyers-perform-pro-bono-services>

important as safeguarding them from unethical practitioners. However, for far too long, occupational licensing mechanisms have adopted the cast of what economist Milton Friedman called a state-level "governmentally created and supported monopoly" run under rules requested by and established for the competition-limiting benefit of members of the regulated industry.¹³

I maintain, then, that the public can be protected without a needless obeisance to a 400-year old protectionist medieval guild system. Why should only prospective lawyers blessed with an ABA imprimatur, "a mere talismanic incantation,"¹⁴ be the sole ones permitted to sit for the Arizona Bar Exam?

Bar exams are but a test of "minimal competency."¹⁵ Let the federally recognized regional accreditors approve the academic standards and curriculum. The Court need not involve itself in the minutiae of accreditation. From that perspective, why not let the graduates of Concord Law School make their own case for their qualifications to practice by passing or failing the exam and satisfying attendant character and fitness requirements?

¹³ Milton Friedman, *Capitalism and Freedom*, University Of Chicago Press, (1962) and also see *Milton Friedman - Who Benefits from Licensing?* <https://www.youtube.com/watch?v=8q71hrwUcu0>

¹⁴ *Macartney, Application of*, 786 P.2d 967, 163 Ariz. 116 (Ariz., 1990) citing Petitioners language seeking reconsideration of their denial to take the Arizona Bar Exam and where this honorable court waived Rule 34(c)(1)(D) concluding "that there is no rational basis to deny petitioners permission to take the Arizona bar examination" but not with the intention of repealing the Rule's requirements "to "open the gates" to graduates of all unaccredited law schools." In *Macartney*, the Court "alluded specifically to the respect and deference we give to the findings and conclusions of the Nevada Supreme Court" and the Petitioners "detailed, voluminous, and persuasive documentation."

¹⁵ Larry Cunningham, *The Bar Exam and Assessment*, Law School Assessment, March 28, 2016, <https://lawschoolassessment.org/2016/03/28/the-bar-exam-and-assessment/> and Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 Pace L. Rev. 343 (2003) citing "what bar examiners have always posited as the bar exam's purpose, i.e. minimum competence to practice law unsupervised." <http://digitalcommons.pace.edu/plr/vol23/iss2/1>

Conclusion.

This petition should be approved for the reasons set forth above and for one more reason stated here, which is that earlier this month, Purdue University purchased Kaplan University, including Concord Law School.¹⁶ Purdue is the only Big 10 member institution without an ABA-accredited law school. Concord will now become the first fully online JD program at a public university. As one news report observed, the move gives Concord's online law school "more credibility."¹⁷

Respectfully submitted this 19th day of May 2017

By /s/ Mauricio R. Hernandez
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¹⁶ Karen Sloan, *Purdue Buys Kaplan's Online-Only JD Program in Education Milestone*, Law.com, May 3, 2017, <http://www.law.com/sites/almstaff/2017/05/03/purdue-buys-kaplans-online-only-jd-program-in-education-milestone/>

¹⁷ *Purdue University acquires online law school*, National Jurist, May 10, 2017, <http://nationaljurist.com/prelaw/purdue-university-acquires-concord-law-school>